United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7004

To be argued by
RICHARD P. LERNER

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ARCHIE PELTZMAN,

Plaintiff-Appellant,

v.

CENTRAL GULF LINES, INC.,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE CENTRAL GULF LINES, INC.

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BRIEF OF DEFENDANT-APPELLEE CENTRAL GULF LINES, INC.

Counterstatement of the Issues

Where the record conclusively established that the appellant:

(a) at the time of his discharge was not a member of the American Radio Association, AFL-CIO, because he failed and refused to pay an initiation fee that was uniformly required by the union constitution and regularly demanded of those in his position; and

(b) was discharged pursuant to a valid union security clause contained in the collective bargaining agreement between the American Radio Association, AFL-CIO, and appellee—

did the District Court correctly find that there was no genuine issue as to any material fact and that appellant was entitled to a Summary Judgment as a matter of law?[1]

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[1] A 3-11 at A 11. "A" refers to Appellant's Appendix, followed by the page number(s) thereof.

Counterstatement of the Case

Background

The appellee, Central Gulf Lines, Inc. ("Lines"), a steamship company, is party to a collective bargaining agreement ("contract") with the American Radio Association, AFL-CIO ("ARA") (SA 4).[2] The ARA is a national labor organization and duly authorized collective bargaining representative for operators employed by appellee (SA 12). Appellant, Archie Peltzman, is a radio operator and former employee of appellee (SA 3, 12).

Appellant was first employed by appellee in August, 1970 (SA 2). In January, May and August of 1971, appellee was advised by the ARA that appellant had not made payment of his union initiation fee (SA 4, ¶11; SA 41, 111-113). The contract between Lines and the ARA contains a union security provision which provides that:

> "The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring." (SA 16, ¶20; SA 42, Section 4. (b)).

On May 28, 1971, the ARA personally advised appellant of the ARA's requirement of the payment of an initiation fee in order to acquire union membership (SA 41)[3] and informed appellant that:

> "If such payment is not made, we shall have no alternative than to request your immediate discharge by the Company." (SA 41).

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[2] References to Appellee's Supplemental Appendix are designated SA followed by the page number(s) thereof.

[3] Such notice was mailed in January to appellant's home address and to appellant at several different places where the SS Green Ridge was scheduled to stop during January 1971 (SA 41, 117-118) with a copy to Lines (SA 117).

On that same date, appellee advised appellant that in conformity with the ARA/Lines contract, he would:

> " . . . not be able to rejoin the vessel without prior clearance from the Union." (SA 6).

Appellant did not pay the initiation fee. In August of 1971, upon completion of appellant's vacation, appellee—having been informed by the ARA that the initiation fee had not been paid and that appellant was not cleared to sail—refused to rehire him in accordance with its contract with the ARA (SA 4, ¶ 11; SA 10-11).[4]

Prior Proceedings

On January 7, 1974, appellant brought the instant action for damages and injunctive relief (73 Civ. 2911).

Appellee was granted Summary Judgment on four separate and distinct grounds. Appellant's Cross-Motion for Partial Summary Judgment was denied (*Peltzman* v. *Central Gulf Lines, Inc.*, 86 LRRM 2127, 1974; not officially reported).

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[4] Appellant filed unfair labor practice charges against the ARA and Lines claiming he was not obligated to pay an initiation fee, that the union security provision was illegal and that Lines' refusal to rehire him was prohibited by the National Labor Relations Act. Rejecting all of appellant's contentions, the National Labor Relations Board's Regional Director refused to issue complaints (SA 17, ¶22; SA 43-44).

These denials were affirmed by the Board's General Counsel (SA 17, ¶22; SA 45-46).

Appellant's subsequent attempts to obtain judicial review were rejected by this Court and the United States Supreme Court (*Archie Peltzman* v. *National Labor Relations Board*, Docket No. 72-1091, not officially reported; 409 U.S. 887 and 409 U.S. 1050 (1972) cert. and rehearing den. respectively).

Additionally, appellant's action against the ARA, concerning the same subject matter as in the instant complaint, was dismissed by the Supreme Court, New York County. The dismissal was affirmed by the Appellate Division. Leave to Appeal was denied by the New York State Court of Appeals (*Archie Peltzman* v. *American Radio Association*, 327 N.Y.S. 2d 505 (1971); 335 N.Y.S. 2d 998 (1972)). Petitions for certiorari and rehearing were denied by the United States Supreme Court (411 U.S. 916 and 411 U.S. 977 (1973) respectively).

Appellant appealed and this Court, Per Curiam, rejected all of appellant's arguments on the law holding that:

> "Most of Peltzman's arguments can be dealt with summarily. Nothing in martime law renders illegal a discharge that is authorized under a legitimate union security clause. There is no colorable basis for an antitrust claim in this case. The security clause here is not subject to attack under the federal or New York constitutions, see *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963); *Buckley* v. *AFTRA*, ——F.2d —— (2 Cir., 1974), slip opinions at 3073; *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1 Cir.), *cert. denied*, 404 U.S. 872 (1971). And any claim that the company has committed an unfair labor practice in discharging him would plainly be subject to the exclusive jurisdiction of the NLRB." (*Archie Peltzman* v. *Central Gulf Lines, Inc.*, 497 F.2d 332 at 334 (1974); A 16).

The case was remanded to the District Court to determine the sole, narrow following issue (497 F.2d at 335):

> "If the initiation fee was uniformly required by the union constitution and by-laws, and was regularly demanded of those in his position, then it is likely that the union security clause was properly invoked and that the contract claim must fail." (A 17).

At a pre-trial conference following remand, appellee informed the Court it would renew its motion for Summary Judgment to establish by affidavits that appellant had not been treated in a discriminatory fashion by the ARA (A 7).[5]

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[5] Appellee did not move for Summary Judgment on the question of appellant's failure to exhaust the contractual grievance procedure. Nor was it necessary for the Court on remand to consider that question once it held Lines had not breached the contract.

The Court established a procedure whereby appellant would advise it when he was ready to reply. The Court informed appellant that the reply need not be in writing; that a hearing would be conducted at which time appellant could produce ". . . any evidence and examine any witnesses he thought appropriate." (A 7). The Court further stated that:

> ". . . such a hearing would not be for the purpose of *determining* any issue of fact but merely for the purpose of smoking out the existence of an issue." (A 7).[6]

An extensive hearing was held before the Court on October 15 and 18, 1974. During the hearing appellant was given great latitude in introducing any evidence bearing on the single issue of this Court's remand.

The overwhelming, uncontradicted, incontrovertible evidence established, as was held by the Court, that:

> ". . . plaintiff at the time of discharge was not a member of the ARA because he failed and refused to pay an initiation fee that was uniformly required by the union constitution and regularly demanded of those in his position. Furthermore, the record shows that plaintiff was discharged pursuant to the ARA's valid union security clause.
>
> Accordingly, I find that defendant has shown with regard to plaintiff's contract claim that there is no genuine issues as to any material fact, and that the defendant is entitled to a judgment as a matter of law, pursuant to Rule 56, Federal Rules of Civil Procedure." (A 11).

Appellant now appeals from the Summary Judgment granted.

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[6] Prior to the hearing, appellant cross-moved for Partial Summary Judgment raising once again all of the legal arguments which had been rejected by this Court in its decision ordering remand (A 12-18 at A 16).

ARGUMENT

POINT I

Appellant Was Expelled From ARA Membership In 1952 In Accordance With The ARA Constitution For Failure To Pay The Required Dues.

Appellant was an active member of the ARA, until mid-1949 (A 4). During 1949 he lost his Coast Guard Radio Operator License and was unable to sail (A 4). After the second calendar quarter of 1949, he stopped paying his union dues (SA 12, 13, 23, 111).

On March 31, 1950 he was automatically suspended from the ARA for non-payment of dues (SA 12-13, ¶ 4; SA 23). That suspension was in strict accordance with the ARA Constitution which provided for an automatic suspension upon a member becoming more than 6 months in arrears in dues payments (SA 22, Article XII, § 1(c)). Appellant was 9 months in dues arrears at the time of his automatic suspension (SA 12-13, ¶ 4; SA 23).

In 1952, the ARA Constitution was amended to provide for automatic expulsion of members who were more than 6 months in dues arrears and that an expelled member to re-enter the union would be able to do so only in accordance with the Permit Card provisions of the Constitution (SA 13, ¶ 6; SA 29, Article XII, § 1(c)).

By virtue of these requirements, which have been maintained in all subsequent ARA Constitutions, appellant and others similarly situated were deemed to be automatically expelled for being in dues arrears in excess of 6 months and would be required to return under the Constitution's provisions as new members (SA 13, ¶ 7; SA 31, Article XII, § 1(c) and § 3(a) and (b); SA 33, Article XII, § 1(c) and § 3(a) and (b); SA 19, ¶ 26; SA 47-104; SA 118, 126).[7]

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[7] Contrary to appellant's contentions, his automatic expulsion in 1952 did not constitute a violation of Title 29, U.S.C. § 411 or § 529—both sections having been enacted into law in 1959. In any event, under Title 29, U.S.C. § 411, a union may expel a member for non-payment of dues without giving him written notice or affording him a hearing.

At the hearing appellant claimed he was on inactive status (SA 111), but introduced no evidence to support his claim. The record conclusively established the contrary. Under the National Assignment Rules then in effect, inactive status was granted only upon written request to the Assignment Committee and a finding by the Committee that the individual was a member in good standing as defined in the Constitution (SA 186, Rule 17; SA 22, Article XII, § 1(h)), i.e., all dues and assessments fully paid up. Appellant admits that, at the time he claims inactive status, he had not paid dues for 21 months—he owed over $100 and dues were $15.00 per calendar quarter (SA 111). In fact, at that point in time, he had already been automatically suspended, pursuant to the Constitution, because his dues arrearages exceeded the maximum permissible six month period (SA 12-13, ¶ 4; SA 22, Article XII, § 1.(c); SA 23). It is also interesting to note that Mr. Smith—not Mr. Lindquist with whom the conversation allegedly took place—was the Secretary Treasurer of the ARA at that time (SA 114).

When appellant returned to employment as a radio operator during December of 1967 he was not then a member of the ARA and was required under the union Constitution to enter as a new member.[8]

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[8] Appellant, while sailing aboard a Grace Line vessel in 1969 filed an unfair labor practice charge against the ARA with the National Labor Relations Board (SA 37). In April of 1970, the Regional Director refused to issue a complaint finding that the $2,000 initiation fee was *uniformly* required for membership in the ARA (SA 38-39). The Board's General Counsel denied appellant's appeal finding that (SA 40):

a) The ARA did not unlawfully deny appellant reinstatement;

b) Appellant had been properly expelled [in 1952] for nonpayment of dues; and

c) Even assuming appellant was on inactive status, such status did not entitle him to withhold dues payment and therefore he was properly expelled, thus, necessitating his re-entry as a new member.

POINT II

The ARA Has Consistently Applied Its Constitutional Requirement For The Payment Of An Initiation Fee Upon All Members Who—Like Appellant—Had Been Suspended And/Or (Pursuant To Later Constitutional Amendments) Expelled For Non-Payment Of Dues and Who Subsequently Returned To Their Former Occupation.

At the hearing on remand, the ARA's Secretary Treasurer stated in his affidavit (SA 13, ¶ 8):

> "Those individuals who were expelled or suspended for nonpayment of dues, and who subsequently returned to their former occupation, were required to pay the ARA initiation fee as a prerequisite to obtaining membership in this union."

This statement was based upon a thorough review of the ARA's records and remains uncontradicted. The review established that throughout its existence 10 men had lost their ARA membership because of non-payment of dues or a withdrawal card predating the adoption of new National Assignment Rules[9] and subsequently returned to their former employment in the industry (SA 19, ¶ 26). These men were:

Name	*Date ARA Membership Lost*	*Date of New ARA Membership*	*Initiation Fee Paid*
Amory L. Allen	Sept. 30, 1949	Apr. 2, 1970	$2,000
Harry Kushner	June 30, 1952	Oct. 16, 1958	500
Henry Doxsee	Apr. 1, 1959	Oct. 1, 1969	1,000
Chris Lancaster	Apr. 1, 1955	Oct. 8, 1968	1,000
Salvatore Casella	Apr. 1, 1954	July 7, 1965	1,000
Amos Laing	Apr. 1, 1954	Apr. 3, 1964	1,000
Joseph Newbrough	Oct. 1, 1957	Jan. 5, 1965	1,000
Ernest Adelman	July 1, 1953	Apr. 7, 1967	1,000
Edward Homer	Dec. 28, 1949	Mar. 8, 1972	1,000
Joseph Ocampo (SA 19, ¶ 26).	June 30, 1951	Oct. 8, 1968	1,000"

[9] The National Assignment Rules adopted in the 1950's, during appellant's 18-year absence, established an employment referral system throughout the maritime industry (SA 14, ¶ 10).

As Mr. Smith stated:

> "Each of the men, like [appellant] were treated in the same manner as a new applicant for membership. In accordance with the ARA Constitution, as a prerequisite to obtaining membership in the union, they were required to pay, and did in fact pay, an initiation fee . . ." (SA 19, ¶ 26).

Allen and Kushner, *like appellant*, were originally automatically suspended for dues arrearages in September 1949 and June 1952 (SA 47 and 51 respectively) and thereafter were automatically expelled pursuant to the 1952 Constitution. Upon their return both men paid the required initiation fee (SA 49 and 53 respectively).

Doxsee, Lancaster, Casella, Laing, Newbrough and Adelman were automatically expelled, pursuant to the provision of the ARA Constitution, for dues arrearages (SA 59, 65, 70, 76, 83 and 90 respectively). They too paid the required initiation fee in order to obtain new ARA membership (SA 62, 68, 73, 80, 86 and 94 respectively).

Ocampo and Homer had withdrawal cards (SA 96 and 100 respectively). They were also required to pay the initiation fee in order to obtain new ARA membership (SA 98 and 103 respectively).

Effective April 1967, the ARA increased its initiation fee from $1,000 to $2,000. Under a policy established by the ARA anyone who was working in Group 2 status[10]—who had a Permit Card and commenced accumulating three hundred sixty (360) days service prior to April 1, 1967—was, upon obtaining Group 1 status,[11] required to pay only the $1,000 initiation fee in effect at the time he was admitted into Group 2 and started sailing (SA 20, ¶ 30; SA 113, ¶ 6).

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[10] An explanation of the group status, i.e., hiring priorities—not relevant to the determination herein—is contained at SA 14 ¶ 11; SA 35-36, § 4(b)(1), (2), (3) and (4); SA 121-122.

[11] Appellant is the only individual, out of 700 ARA Group 1 status men, who has refused to pay the required initiation fee (SA 136, 139-141, ¶¶ 4, 5 and 8). In fact, "He is the only one in the history of the union that has not paid an initiation fee." (SA 136).

Thus anyone who, like appellant, obtained Group 2 status[12] and commenced accumulating three hundred sixty (360) days service subsequent to April 1, was required to and did in fact pay the $2,000 initiation fee required for ARA membership—with one exception.[13] The exception was Edward Homer, who started sailing after April 1, 1967, and who paid a $1,000 not a $2,000 initiation fee.

Homer, like appellant, was refused a Coast Guard License and could not sail (SA 20, ¶ 31; SA 128-129). He, like appellant, obtained his license back after many years (SA 129-130) and returned to his former employment as a Radio Operator (SA 102-103). Aside from these two facts the two cases are totally dissimilar.

Homer followed the Constitutional procedures and requirements, at the time he lost his Coast Guard License, including the payment of dues (SA 100, 129-130).

Appellant ceased paying his dues (SA 12-13, ¶ 5; SA 23, 111).

Homer was not suspended from the ARA. He received a withdrawal card (SA 100) thereby leaving the union as a member in good standing (SA 20, ¶ 31; SA 22, Article XII, § 2). Thereafter he ceased paying his dues (SA 100).

Appellant admits he did not receive a withdrawal card (SA 111, 131-132). He was suspended from membership pursuant to the ARA Constitution because he was in

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[12] Appellant obtained Group 2 status and commenced sailing in December 1967 (SA 14, ¶ 9; SA 26; SA 113, ¶ 7). Accordingly, appellant would have to pay $2,000 to obtain ARA membership.

[13] As noted in the District Court's decision, appellant raised the case of a Mr. Spoonmore. He was a Radio Opera or suspended in the 1940's for failing to pay dues. He was reinstated in 1951 after paying a $180 fee. As the Court found that case:

> "... is not analogous to that of [appellant's] since the union constitution was amended only after 1951 to require the payment of a new initiation fee for expelled members seeking readmission to the union." (A 8, footnote 2).

arrears in his dues for a period in excess of six months (SA 12-13, ¶ 14; SA 22, Article XII, § 1(c); SA 23).

When Homer finally obtained his Coast Guard License, the union informed him that, pursuant to its Constitution, the full initiation fee was required to be paid by members who had not kept up their dues, whether they had been expelled or withdrawn in good standing.[14]

Homer disagreed with the ARA's position and retained Counsel (SA 132, A 88-89). After negotiations between Homer's Counsel and the ARA, it was agreed that the cost of litigation would substantially exceed the amount in question and agreed to settle the matter upon payment of a $1,000 initiation fee rather than the $2,000 fee demanded (SA 20, ¶ 31; SA 132; SA 103). Homer, however, acknowledged that an initiation fee had to be paid (SA 132).

From the foregoing, it is clear that the ARA did not discriminate against appellant by requiring that appellant had to pay the $2,000 initiation fee to acquire ARA membership.

As the District Court correctly found (A 9-10):

> "In the first place, it seems clear that Homer was in a stronger litigating position vis-a-vis the union than was the plaintiff. Regardless of the technicalities involved, a former union member who—when he was

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[14] As Mr. Smith pointed out, under the present ARA Constitution, a member who obtains a withdrawal card and applies for reinstatement within a three year period is required to pay all dues, fees and other financial obligations which he would have paid during his period on withdrawal before he will be reinstated (SA 132-133). However, as Mr. Smith further pointed out, the Constitution provides that:

> "All those who have been on withdrawal for three years or longer shall enter the union subject to Section 3 of Article XII (as a new member) and he shall be required to meet all obligations set forth therein." (SA 133).

See Ocampo, *supra*, pp. 8-9.

> improperly ousted from his job—took the trouble to comply with the union's regulations and to withdraw in good standing could expect a more sympathetic judicial hearing than one who had simply permitted himself to be expelled. * * * Be that as it may, I can't believe that the circumstances that the union settled a dispute with one member rather than engage in protracted litigation would brand as 'discriminatory' any attempt by the union to enforce its regulations against the rest of its members. This consideration becomes the more compelling in light of the conceded fact that this plaintiff never made any attempt to settle his dispute with the union. On the contrary he insisted on forcing the union to engage in the very litigation its settlement with Homer was designed to avoid."[15]

It is beyond dispute that the initiation fee demanded of appellant was uniformly required by the ARA Constitution and regularly demanded of those in his position. Having failed to pay that fee he was not a member of the ARA at the time of his discharge pursuant to the union security clause[16] contained in the ARA/Lines contract.[17]

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[15] As Mr. Smith stated, appellant:

"*. . . has never questioned the amount of the initiation fee required.* Rather *he has steadfastly maintained that he should not be required to pay any fee whatsoever.*" (SA 21, ¶ 32) (Emphasis added). (See also, SA 135).

[16] The decision in *Mobile Oil Corp.* v. *Oil, Chemical & Atomic Workers International Union*, 504 F. 2d 272 (CA 5, 1974), is inapplicable here. Appellant is a resident of New York, was discharged in New York, and Louisiana, where appellee has its principal office, repealed its Right-To-Work Law in 1956, Act 16 L. 1956.

[17] Appellant's contention that appellee's Counsel failed and refused to supply him with documents and information requested is untrue. Prior to the October hearing, appellee's Counsel corresponded frequently with appellant answering questions presented and arranging for appellant's review of documents requested by him

(*footnote continued on following page*)

CONCLUSION

There being no genuine issues of any material fact, it is respectfully submitted that the District Court's grant of appellee's Summary Judgment be affirmed and appellant's Cross-Motion for Partial Summary Judgment be denied.

Dated: New York, New York, April 9, 1975.

Respectfully submitted,

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(*footnote continued from preceding page*)

which were in the possession of the United States Coast Guard (SA 175-183). Furthermore, during the course of the October 15th hearing, appellee's Manager of Marine Personnel made available to appellant, the Company's files maintained in its New Orleans office (SA 112, 120) and appellant chose not to review them.

Also, at the Court's direction appellant was given the opportunity to review the files maintained by the union and did in fact review those files (SA 137, 168-171). At and after the October 15th and 18th hearing additional materials were made available by the ARA to appellant (SA 139-167).

Finally, appellant's contention that the District Court did not afford him a full opportunity to reply to the Motion for Summary Judgment and present evidence in support of his Cross-Motion for Partial Summary Judgment is without merit as is witnessed by the 229 page transcript. Additionally, all witnesses requested by appellant were present and ready to be examined but appellant voluntarily chose to examine only four of the witnesses.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RCHIE PELTZMAN,
Plaintiff-Appellant,

vs.

L GULF LINES, INC. (sued herein as "CENTRAL GULF STEAMSHIP COMPANY")
Defendant-Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE

OF NEW YORK,
Y OF NEW YORK, ss.:

Rose Rinella , being duly sworn, deposes and says that she
er the age of 18 years, is not a party to the action, and resides
951 East 17th Street, Brooklyn, New York, 11230
on April 9, 1975 , she served 1 copies of Supplemental
pendix of Defendant-Appellee, Central Gulf Lines, Inc. and and 2 copies of Brief for Dfendant-Appellee

ARCHIE PELTZMAN, Esq.,
8725 16th Avenue,
Brooklyn, New York 11214

elivering to and leaving same with a proper person or persons in
ge of the office or offices at the above address or addresses during
usual business hours of said day.

Rose Rinella

n to before me this
day of April , 19 75

John V. Esposito

JOHN V. DESPOSITO
Notary Public, State of New York
No. 30 0682350
Qualified in Nassau County
Commission Expires March 30, 1977